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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

MAJISTEE CORPORATION,

Plaintiff and Appellant,

v.

ANDREW A. LEWIS et al.,

Defendants and Respondents.

F043934

(Super. Ct. No. CV49727)

**OPINION**

APPEAL from a judgment of the Superior Court of Tuolumne County. William G. Polley, Judge.

Neumiller & Beardslee and Clifford W. Stevens for Plaintiff and Appellant.

Adleson, Hess & Kelly, Patric J. Kelly and Duane W. Shewaga for Defendants and Respondents.

**-ooOoo-**

Appellant Majistee Corporation (Majistee) appeals from the judgment of dismissal entered July 8, 2003, after the trial court sustained a demurrer without leave to amend on the basis that all issues were res judicata as a result of a bankruptcy court order granting relief from the automatic stay. We reverse the judgment and remand the matter to the trial court for further proceedings.

### **FACTUAL AND PROCEDURAL PROCEEDINGS**

Majistee was the owner of real property in Tuolumne County. The respondents held a security interest in the property in the form of a deed of trust. The deed of trust had been given by Majistee to secure money owed by Majistee. The respondents claimed the debt was not being paid as promised and sought foreclosure through the deed of trust.

Majistee filed a Chapter 11 bankruptcy petition on March 29, 2002. In the bankruptcy schedules filed by Majistee, the debt owing to the respondents was listed as disputed.

The respondents filed a motion for relief from the automatic stay (11 U.S.C. § 362(a)) in the bankruptcy court. The motion itself was not included in the record on appeal, but the record indicates that the motion was contested. The bankruptcy court granted the motion, permitting the respondents to pursue their remedies under state law. The order was filed on November 15, 2002.

A foreclosure sale was held and the property was purchased by the respondents at the sale. On that same date, December 26, 2002, Majistee filed a second bankruptcy petition. Because Majistee filed a second bankruptcy petition, the respondents again moved for relief from the automatic stay. Majistee disputed the amount of the debt in its opposition to the motion for relief from stay. The order granting the motion for relief from stay provides that the “automatic stay is annulled.” [¶] “Except as so ordered, the motion is denied.”

Thereafter, on April 22, 2003, Majistee filed a complaint in state court to set aside the sale, cancel the trustee’s deed, quiet title, and for damages. At some point,

Majistee filed a lis pendens against the property. The respondents demurred to the complaint. On June 17, 2003, the trial court sustained the demurrer without leave to amend. Also on June 17, the trial court issued an order expunging the lis pendens. Majistee appealed the decision of the trial court.

The respondents obtained a judgment for unlawful detainer on July 17, 2003. Majistee did not appeal from this judgment.

On February 18, 2004, the respondents filed a motion to dismiss the appeal. The motion alleged that the real property had been sold to a third party; Majistee did not appeal from the unlawful detainer judgment; and Majistee did not pursue any writ proceeding based upon the order expunging the lis pendens. The respondents contend that the appeal is moot as no effective relief can be granted Majistee because the real property has been sold to third parties.

On April 5, 2004, Majistee filed its opposition to the motion to dismiss the appeal. By order dated April 7, 2004, this court reserved ruling on the motion pending a determination of the merits of the appeal.

## **DISCUSSION**

### **I. Effect of Bankruptcy Court Order**

The respondents contend that the bankruptcy court order granting relief from the automatic stay is res judicata or collateral estoppel as to all issues that were raised by Majistee in its complaint. The respondents are incorrect.

The respondents rely primarily upon the case of *Billmeyer v. Plaza Bank of Commerce* (1995) 42 Cal.App.4th 1086 for the proposition that the bankruptcy court order granting relief from the automatic stay is res judicata with respect to the subsequent civil action filed by Majistee. *Billmeyer* is factually distinguishable. In *Billmeyer*, the order terminating the automatic stay was a comprehensive order, which included a determination of dollar amounts owing, lender liability causes of action, and future use and ownership of the property at issue. (*Id.* at p. 1093.)

On the other hand, neither of the relief from stay orders issued in the Majistee cases are comprehensive orders. The first relief from stay order merely recites that the parties are free to pursue their remedies under state law. It does not detail the amount or establish the validity of the obligation to respondents and does not include any findings on any of the issues that were raised in the civil action in state court. Thus, it is not a comprehensive order. (*Billmeyer v. Plaza Bank of Commerce, supra*, 42 Cal.App.4th at p. 1095.) The second order recites that the automatic stay is annulled but again makes no specific findings or determinations of issues raised in the state court action. Whatever other relief the respondents requested in their motion for relief from stay was denied.

The other case cited by the respondents, *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, also is factually distinguishable. In *Abdallah*, the assertion was that the lender had submitted a false declaration and violated rules of procedure with respect to the motion for relief from stay. The court held that the doctrine of res judicata precluded raising these issues in a state court proceeding. Instead, these issues should have been asserted in the bankruptcy court proceeding. (*Id.* at pp. 1106-1107.)

An order granting relief from the automatic stay to pursue foreclosure, or state law remedies, merely allows the parties to pursue their rights in state court or under state law. The stay litigation is not a proper vehicle for, nor does it determine the nature and extent of, the rights of the parties pursuant to state law. (*In re Axton* (9th Cir. 1981) 641 F.2d 1262, 1270; *In re Ellis* (Bankr. 9th Cir. 1985) 60 B.R. 432, 435-436.)

In Majistee's case, there is no indication in either of the orders granting relief from the automatic stay that the issues raised in Majistee's state court lawsuit filed April 22, 2003, actually were litigated and determined. Because the orders granting relief from the automatic stay made no determination as to the nature and extent of either Majistee's or the respondents' rights under state law, those orders do not operate to invoke the principal of res judicata with respect to the causes of action asserted in Majistee's state court lawsuit.

The party asserting res judicata or collateral estoppel has the burden to show from the record that the issue was litigated and determined previously. (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 257-258.) The respondents have failed to meet their burden of proof.

Having concluded that the bankruptcy court orders do not operate to invoke the doctrine of res judicata or collateral estoppel, it follows that the trial court erred in granting the respondents' demurrer without leave to amend.

## **II. Requirement of Tender**

The respondents next contend that Majistee is barred from challenging the validity of the sale because it failed to tender the amount due under the respondents' note and deed of trust. Without an allegation of a tender in the complaint, the respondents maintain that the complaint fails to state a cause of action.

Although the general rule is that a tender must be made, there are exceptions. A tender is not required where (1) it would be inequitable to require one; (2) the complaint attacks the underlying debt; or (3) there is a counterclaim or setoff. (4 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 10:212, p. 689.) Furthermore, a tender is not required if the sale is void, as opposed to voidable. (*Id.* at p. 686.) A trial court also has discretion to permit payment to be made after a judgment is entered on the complaint. (*Ibid.*)

Regardless of whether a tender was necessary, Majistee is barred from relitigating the issue of possession of the property by virtue of the unlawful detainer judgment, as discussed *post*, and the tender is not necessary for an assertion of other causes of action.

## **III. Motion to Dismiss**

Subsequent to the trial court granting the respondents' demurrer without leave to amend and entry of a judgment of dismissal of Majistee's complaint, the respondents obtained an unlawful detainer judgment against Majistee. The respondents contend that because no appeal was taken from the unlawful detainer judgment, the appeal of the judgment dismissing the complaint is moot in that no effective relief can be granted.

From the limited information available in the record on appeal, it appears that the respondents foreclosed under the deed of trust, purchased the property themselves at the trustee's sale, obtained an unlawful detainer judgment, and then sold the property to a third party.

The sale at the trustee's sale was not a sale to a bona fide purchaser. The respondents themselves purchased the property. The respondents assert in their motion to dismiss that the property subsequently was sold to third parties, although no trustee's deed or other proof of such sale is in the record. Majistee appears to agree that there has been a sale to an unrelated third party.

If, in fact, a sale to third parties who are bona fide purchasers for value has taken place, then the sale cannot be set aside. (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 831.) Thus, no relief can be granted as to Majistee's causes of action to set aside the trustee's sale, cancel the trustee's deed, and quiet title in Majistee. If, on the other hand, the only sale of the real property has been to the respondents, Majistee may attack the validity of the sale. (*Id.* at pp. 831-832.)

As for the effect of the unlawful detainer judgment, unlawful detainer actions are summary proceedings. (*Barela v. Superior Court* (1981) 30 Cal.3d 244, 249.) Counterclaims, cross-claims and affirmative defenses generally are not considered. (*Ibid.*)

While the right to possession of the real property may not be relitigated because Majistee failed to appeal the unlawful detainer judgment, other causes of action, such as claims for damages or claims that allegedly were incurred after that judgment was entered, are not barred. (*Green v. Superior Court* (1974) 10 Cal.3d 616, 622; *Zimmerman v. Stotter* (1984) 160 Cal.App.3d 1067, 1074-1076.)

#### **IV. Conclusion**

The bankruptcy court order was a standard form order permitting the parties to go back to state court and litigate the issues in that forum. The respondents greatly

overstated the effect of the bankruptcy court order when responding to Majistee's complaint in state court. As a result, there still has not been any determination on the merits of Majistee's claims against the respondents.

Majistee is barred from relitigating the issue of the right to possession of the real property. Majistee, however, can litigate the issue of damages resulting from any alleged wrongful eviction, abuse of process, or malicious prosecution engaged in by the respondents in the course of obtaining possession of the property. We make no determination in this appeal on the viability or merits of any such causes of action.

The state of the ruling on the demurrer in the trial court is such that we conclude that the best way to proceed is to allow Majistee to amend its complaint.

#### **DISPOSITION**

Respondents' motion to dismiss the appeal as moot is denied. The judgment of dismissal entered July 8, 2003, is reversed and the complaint is reinstated. Majistee shall have 30 days after this decision becomes final to file an amended complaint. Majistee shall recover its costs.

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CORNELL, J.

WE CONCUR:

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VARTABEDIAN, Acting P.J.

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DAWSON, J.